United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1336

To be argued by
FEDERICO E. VIRELLA, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1336

UNITED STATES OF AMERICA,
Appellee,

—v.—

ALPHONSO C. POWE, JR.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Alphonso C. Powe, Jr. appeals from a judgment of conviction entered on June 11, 1975, in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 75 Cr. 413 was filed in three counts on April 23, 1975. Count One charged Powe with conspiracy to embezzle approximately $31,192.26 in cash from a bank, in violation of Title 18, United States Code, Section 371. Count Two charged him with aiding and abetting Patricia Carter in the execution of the scheme to embezzle the $31,192.26 from a New York City bank, in violation of Title 18, United States Code, Sections 2 and 656. Count Three charged Powe with the interstate transportation of

stolen money from New York to Philadelphia, Pennsylvania and elsewhere, in violation of Title 18, United States Code, Sections 2 and 2314.

Trial commenced on June 10, 1975, and concluded on the following day when the jury returned a verdict of guilty on all counts against the defendant. On September 5, 1975, Powe was sentenced to two concurrent terms of imprisonment of three years on Counts One and Two. On Count Three, the District Court suspended the imposition of sentence and placed the defendant on probation for a term of three years, with the special condition that he make restitution in accordance with the requirements set by the probation office.*

Powe is currently serving his sentence.**

Statement of Facts

A. The Government's Case

The Government's proof at trial revealed the existence of a conspiracy between Alphonso C. Powe, Jr., and Patricia Carter that culminated in the embezzlement of approximately $31,000 from a Manhattan bank

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* Prior to trial, Patricia Carter pleaded guilty to a one count indictment, 75 Cr. 103, charging her with emblezzling $31,192.26 from the Chemical Bank in New York City. On May 9, 1975, the Honorable Morris E. Lasker, United States District Judge, Southern District of New York, sentenced Carter, under the Youth Correction Act, Title 18, United States Code, Section 5010(a), to a term of probation for three years, with the special condition that she make restitution as determined by the probation office.

** On July 6, 1976, a belated notice of appeal was ordered filed *nunc pro tunc* as of September 5, 1975. (A. 3).

and the subsequent interstate transportation of the stolen money from New York City to Philadelphia, Pennsylvania and finally to Oakland, California, during August 1973. The principal witness against Powe was his former co-conspirator Patricia Carter. (Tr. 23-65).*

1. The Lovers' Background and the $800 Scheme

Patricia Carter, after having graduated from high school in June 1972, began working as a paying and receiving teller with a Chemical bank branch located at 425 Park Avenue in Manhattan in late August of 1972.** Later that year, in November 1972, Carter met Powe at a party where he introduced himself as "Alex Thompson".*** Shortly thereafter, Carter began to go out with the defendant on a weekly basis; during this time she told him that she was employed at the Chemical Bank. (Tr. 23-26).

In January 1973, while at Powe's apartment at 925 Prospect Place in Brooklyn, New York, Powe asked

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* Citations in the form "Tr." refer to pages in the official transcript; citation to "Br." refer to Powe's brief; citations to "A" refers to Powe's appendix; "GX" refers to Government's exhibits.

** Carter also testified that her duties included the cashing of checks, handling large sums of cash and filling out money orders. (Tr. 24). Additionally, Anthony Dapuzzo, the officer in charge of the bank's administration, testified that the deposits of the Chemical Bank branch at 425 Park Avenue, New York, New York, were insured by the Federal Deposit Insurance Corporation on August 7, 1973, and that the FDIC certificate is on display at that branch. (Tr. 97-99; GX 6).

*** The defendant's true name was Alphonso C. Powe, Jr., which Carter first learned in Oakland, California. (Tr. 64). In addition to Powe and Thompson, the defendant used the names of "Alpo", "Lewis Davis", and "Alex Greene".

Carter if she could make out a money order in the amount of $800. Carter agreed to a plan wherein the defendant would come to the bank and request from Carter a money order for $800. A few days later, in accordance with the plan, Powe arrived at Carter's teller window at the bank and asked her for an $800 money order which she promptly prepared and gave to him. (Tr. 26-28; GX 13).*

2. The Scheme Is Planned and Executed

Later that summer (late July and early August 1973), Carter began to live with Powe at his new apartment located at 317 Sterling Place in Brooklyn. There, on August 6, 1973, Carter and Powe had a conversation in which they agreed upon a new plan wherein Carter would take $30-40,000 from the bank and meet Powe during her lunch hour. Powe and Carter further agreed that during the next morning Powe would call Carter and arrange a time to meet her at 54th Street and Lexington Avenue after she scheduled her lunch hour. (Tr. 30-33).

Upon her arrival at work on August 7, 1973, Carter signed her teller's proof sheet for that day, reflecting that she was entrusted with $17,053.49 as starting cash; she then ordered and received further $16,000 in cash from Jose Mendez, the head teller. (Tr. 33-36, 95-97; GX 1, 2). Having received the money, Carter, pursuant to the plan, proceeded to place the cash in her pocket-

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* The money order was dated January 31, 1973, and was payable to the order of Alex Thompson in the amount of $800. Additionally, the money order was signed in the name of "Robert Fisher". (GX 13). During Powe's cross-examination, the defendant admitted that he signed the fictitious name of "Robert Fisher" on the order and deposited it in his bank account. (Tr. 136-38).

book, which she had previously placed inside her cash drawer. She then asked Mendez for and received permission to take her lunch break at 11:00 o'clock. At approximately 10:30 Powe telephoned her and he confirmed that she had the money. When Carter advised him that her lunch hour was scheduled for 11:00 o'clock, he instructed her to meet him at the corner of 54th Street and Lexington Avenue at 11:00 o'clock.

At that hour, Carter took her pocketbook filled with the money and proceeded to meet Powe at the prearranged location. The pair entered a taxi and Powe instructed the driver to drive down Park Avenue and told Carter to rest down on the car seat so that no one could see her as they drove past the bank area. After riding for a time they entered a bar on 125th Street where Powe told Carter to change clothes and put a wig on. He also told her to take the money out of her pocketbook and put it in his attache case. Carter then went into the bathroom where she changed her clothes and transferred the money from her pocketbook into the defendant's attache case. She then rejoined Powe at the bar, where she gave him his attache case with the money. The two then left the bar. (Tr. 36-40).

3. The Cross-Country Trip to Philadelphia and Points West to Oakland, California

Having left the bar, Powe told Carter that they were going to Philadelphia. After a short wait, he found a "gypsy cab" driver who agreed to drive them to that city. After a three hour ride they arrived in Philadelphia where they stopped at a motel. There, the defendant registered and the two proceeded to their motel room, where they eventually counted the money. (Tr. 41-44). On the following day, they left the motel but

not before Powe wiped over the furniture so as not to leave any fingerprints. Powe and Carter then took a bus to downtown Philadelphia where they purchased Amtrak train tickets* for a train ride to St. Louis which lasted approximately 1½ days. They left the train in St. Louis and took a taxi to a hotel where they registered and stayed for a day and a half. (Tr. 44-48). They then left St. Louis and took an airplane to Oakland, California. There, they registered and stayed at a Great Western Hotel for a few days. After Powe found an apartment located at 2201 Seventh Avenue in Oakland, they signed an application form to rent and a lease under the names of Lewis and Sharon Davis. (Tr. 49-52; GX 3, 4). At the apartment, the money stayed by Powe's side of the bed. Shortly after their arrival in Oakland and in the early part of September 1973, Powe purchased a Cadillac for approximately $8,000 of the stolen money from the bank.** (Tr. 58-59). Sometime later, Powe, having read an advertisement in the local newspapers, told Carter that he wanted to make the money grow and to invest it in a vending machine busi-

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* At about this time Powe also purchased the New York Times to see what had developed in New York. He gave Carter the newspaper to read so that no one would notice her on the train. (Tr. 46-47).

** On September 8, 1973, the El Dorado Cadillac was purchased by Powe under the name of "Lewis Davis" from Jack Applegate, an employee of George Olsen Cadillac in San Francisco. The actual cost of the sale was $7,551.94 (Tr. 104-07; GX 7). The Cadillac was later resold to the same firm by Powe in May 1974 for $5,300. At the time of the transaction, Applegate remembered the defendant carrying a dark black attache case. (Tr. 106-09; GX 8, 9). Carter had testified that the attache was an olive green color. (Tr. 49).

ness. He then proceeded to purchase 300 vending machines for $9,000* as well as a station wagon.**

B. The Defendant's Case

The defendant took the stand on his own behalf. He said that from 1972-1973 he occasionally went out with his lady friend, Patricia Carter, who he knew worked at the Chemical Bank. A few months prior to August 6, 1973, Carter told him in his apartment in Prospect Place that a few fellows had asked her to do certain things, such as cash a check or take money out of the bank, for them. (Tr. 118-120). He then testified that on the night of August 6, 1973, Carter came to his apartment because she was upset with her mother and that she said that she was going to take the money out of the bank and leave New York. Powe said nothing to her at this time. (Tr. 120-22).

On the next day, August 7, 1973, Carter went to work and Powe stopped by the bank to take her to lunch after calling her to arrange the luncheon date. They met on a street corner where, according to Powe, Carter told him, "I got it." Powe then stated that she called a cab and they went uptown to a bar where she changed her

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* In November 1973, Powe, using the name Lewis Davis, met with Fraser Hewitt, a vending machine operator, who had placed an advertisement in the local newspaper in Oakland to sell some of his vending machines. After an initial meeting with Powe, Hewitt agreed to and did sell 300 vending machines for $9,000. Powe wanted to pay the $9,000 in cash but Hewitt refused to accept cash. During the meeting Powe had a dark attache case with him. Powe subsequently paid the price on the bill of sale (GX 10) of the machines by a money order. (Tr. 110-14). In September 1974, Powe resold the machines to Hewitt. (Tr. 114-15; GX 11).

** Powe, by this time had a California driver's license under the name of Lewis Davis. (Tr. 60-62; GX 5).

hairdo with a wig. At this time, Carter told him that she took the money out of the bank and she insisted on leaving New York. He went with Carter to Philadelphia by a gypsy cab. (Tr. 122-23). Powe testified he saw the money for the first time in Philadelphia and that "then it really hit me that she actually did this thing." (Tr. 122-24). From Philadelphia, they went to St. Louis by train and then to Oakland, California by plane. Powe then testified that he didn't want to leave New York but that she said "Well, I'm going. You can stay if you want, but I'm going . . .". (Tr. 124-25).

Powe stated that in California Carter wanted to buy the Cadillac because she got tired of lugging the groceries up a hill to their apartment, but tha it was his idea to buy the vending machines to make s me type of income. The money was always kept by Carter in the mattress under the bed. (Tr. 125-26). Finally, Powe denied conspiring with Carter to take the money out of the bank and further testified that the reason he went with her when she had the stolen money was because "I was in Philadelphia with her and she had the money. I didn't have any money. She said if I went back she was going to keep going and I just stayed with her." (Tr. 126-27).

On cross examination, the defendant admitted that in late January 1973, he filled out a money order Carter gave him for $800 using the fictitious name of "Robert Fisher," which he deposited in his bank account. (Tr. 136-40). Powe also admitted that when he met Carter on the afternoon of the embezzlement he had his attache case with him.* He also testified that in the bar at 125th Street he figured that Carter had the money from the

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* He explained that ever since he lost his wallet he began to carry his wallet in the attache case most of the time. (Tr. 155).

bank (Tr. 152-55, 165-[illegible]; that at the motel in Philadelphia he registered under a name other than his real name;* and, that when he saw the money he said, "Wow!" (Tr. 161-62).** Finally, Powe admitted that when he travelled from New York to Oakland with Carter he knew she had money stolen from a bank. (Tr. 174).***

ARGUMENT

POINT I

The Trial Court Properly Received Into Evidence The January 1973 Transaction Between Carter And The Defendant.

Powe claims that the District Court committed reversible error depriving him of a fair trial by the admission of Carter's testimony about a January 1973 money order transaction with Powe.**** After hearing argument, the testimony was admitted by Judge Wyatt on the issue of the defendant's intent, motive, and relationship to the co-conspirator Carter (Tr. 3-5). The District Court instructed the jury to this effect at the time the

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* He also admitted that he was in the habit of not telling the truth about his real name and that he used the names of "Alex Thompson", "Alex Green", and "Lewis Davis." (Tr. 133).

** Powe also stated that Carter counted approximately $30,000 which he "strongly believed she took from the bank." (Tr. 165).

*** He explained that the reason he didn't go back to New York was that "I wanted to really see how far she was going with this thing. I guess I was curious or something." (Tr. 167).

****Carter testified that in January 1973, Powe asked her to issue him a money order in the amount of $800.00 which she subsequently did, and which the defendant thereafter endorsed with the fictitious name of "Robert Fisher" and deposited in his bank account. (Tr. 26-28; 136-48; GX 13).

evidence was introduced (Tr. 28-29). The admission of this evidence was proper on this and several other grounds F. R. Evid. 404(b).

The law is well-settled in this Circuit that "evidence of other criminal offenses is admissible if it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). See also *United States* v. *Eliano*, 522 F.2d 201, 202 (2d Cir. 1975); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130, 140-141 (2d Cir. 1975).

Here, it is plain that the evidence was not offered to prove the defendant's criminal character. Evidence of the defendant's earlier embezzlement transaction with Carter was admissible to establish the existence and nature of their relationship, *United States* v. *Garelle*, 438 F.2d 366, 368 (2d Cir. 1970), *cert. dismissed*, 401 U.S. 967 (1971); *cf. United States* v. *Diggs*, 497 F.2d 391, 394 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974), and was "relevant to prove that [the defendant and Carter] could well have been continuing along the same line" in their later plan and scheme to embezzle the actual cash from the bank, *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *United States* v. *Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973). Indeed, absent this evidence of earlier embezzlement between Carter and the defendant, the jury might well have found implausible Carter's testimony about the defendant's readiness to recruit her as the "insider" at the bank to embezzle the $30-$40,000 the defendant wanted. In addition, the evidence of the earlier bank embezzlement rela-

tionship between the defendant and Carter was relevant and probative of the existence, background, development and purposes of the conspiracy charged in the indictment. *United States* v. *Natale*, 526 F.2d 1160, 1173-1174 (2d Cir. 1975); *United States* v. *Torres*, *supra*, 519 F.2d at 727; *United States* v. *Papadakis*, *supra*, 510 F.2d at 294-295; *United States* v. *Cioffi*, 493 F.2d 1111, 1115 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974); *United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973).

In the face of the clearly proper exercise of discretion below, the defendant attacks the admission of the evidence of the earlier money order transaction, claiming that, while the Judge received it as proof of intent, motive, and relationship "[t]he issue in this case was one of credibility. If Miss Carter was believed with respect to the charges of the indictment, then the defendant was guilty." (Brief at 14).* But even if this evidence should not have been received as proof of intent, its admissibility is certainly sustainable on the ground that it demonstrated the conspiratorial relationship between Powe and Carter. *United States* v. *Torres*, *supra*, 519 F.2d at 727. Moreover, the evidence was clearly admissible in the trial judge's discretion to prove intent. The charges in the indictment required the Government to establish beyond a reasonable doubt a specific intent to violate the substantive statute and knowledge that the money was stolen. Despite the current focus of the defense on Carter's credibility as the principal issue in the case, defense counsel reminded the jury in both his opening remarks (Tr. 21-22) and in summation that the Government had the bur-

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* However, counsel in his closing remarks argued differently to the jury: "This isn't a question of who you believe . . . the question is: Has the government proven the case beyond a reasonable doubt?" (Tr. 196). His opening statment similarly stressed the sufficiency of the Government's proof, and did not mention credibility. (Tr. 19-22).

den to prove beyond a reasonable doubt the charge against the defendant. (Tr. 189, 196). Thus "[t]he appellant's intent . . . was an essential element of the crime charged in the indictment, an element which the appellant never indicated below he did not consider to be in issue, and an element the Government had the burden of proving beyond a reasonable doubt." *United States* v. *Kaplan*, 416 F.2d 103, 104 (2d Cir. 1969). Evidence that tended to establish that intent was accordingly admissible. *Id.**

Powe also argues that the evidence of the January 1973 transaction was not similar to the crimes proved at trial and thus not admissible in evidence.** However, the proof of the money order transaction clearly related to activities that were closely related not only in time (a span of only seven months separated the two transactions), but, more importantly, to the subject matter of the instant indictment. The law is well-established that "such evidence . . . its probative value, determined by the trial court, is dependent in the 'existence of a close parallel between the crime charged and the acts shown.'" *United States* v. *Chestnut*, 533 F.2d 40, 49 (2d Cir. 1976). Here, the gravaman of both the January 1973 and August 1973 embezzlements was a calculated scheme by an "outsider" (the defendant) and an "insider" (Carter) to steal money from the Chemical Bank and use the stolen money for the defendant's purposes. Given the "close temporal proximity" and that the prior act was "closely related in both subject matter and manner to the crime charged in the indictment," *United States* v. *Chestnut*, *supra*, 533 F.2d at 50, the District Court could properly find the two transactions similar. The District Court correctly per-

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* Moreover, as this Court has recently noted, the evidence was "highly probative of [the defendant's] knowledge and intent, as well as his motive, and further suggested a general plan." *United States* v. *Grady*, Dkt. No. 76-1201, slip op. 291, 302 (2d Cir., October 27, 1976).

** Not surprisingly, this claim of error is unencumbered by any specific citations to decisional authority on point. (Br. 14).

mitted the introduction of evidence of the prior offense for proper purposes. In such a situation the broad discretion of the trial judge, "who has a feel for the effect or the introduction of this type of evidence that an appellate court working from a written record, simply cannot obtain," will rarely be disturbed on appeal. *United States* v. *Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (May 3, 1976).

POINT II

The District Court's Instructions Were Accurate And Consistent With The Law.

Powe claims that the District Court's failure to charge "that the mere fact that the defendant helped spend the embezzled money was insufficient to establish his guilt of the crimes charged" (Br. 16) was error.* The conclusion is unfounded.

In asserting this claim, the defendant argues that the District Court should have instructed the jury that the first two counts were completed upon the embezzlement and that the third count charged a crime that necessitated the exercise of dominion and control over the embezzled funds during the interstate transportation. (Br. 20). Although the defendant raises these issues now for the

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* In his brief, counsel states that much of the evidence concerning the use of the money in California was received over defense objection. Though counsel did object during Carter's testimony, a reading of the record, specifically the testimony of Jack Applegate and Fraser Hewitt, shows that the evidence concerning the purchase of the Cadillac and, certainly, the vending machines was not *specifically* objected to by the defendant. (Tr. 54-60, 103-07, 110-15).

first time, he failed to preserve the issues adequately in the trial below. Prior to the summation and charge, the defendant submitted seven requests—not one of which addressed itself to the issues raised on this appeal. Following the District Court's charge, the defendant failed to object specifically to Judge Wyatt's instructions concerning the conspiratorial period. Though defendant now argues that counsel below properly and adequately preserved the record on appeal, it is clearly apparent that the objection raised below was addressed *solely* and *directly* to what counsel opined to be an element of the crime of interstate transportation of stolen money, namely that the defendant's use of the money in California was not an element of the offense (referring to Count Three).* Therefore, since he failed to make a proper and specific objection before the District Court, Powe is now precluded from seeking a review of the charge. F. R. Crim. P. 30; *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd.*, 402 U.S. 146 (1971); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

Even if Powe had properly objected to the charge, there would be no grounds for review in this case. Though

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* Thus, when Judge Wyatt, after giving his charge to the jury, asked if there were any objections, defense counsel stated: "I have an exception. I feel that the crime was complete when the couple arrived in Califorina and actions by the defendant in California should not be considered by the jury. That is an element of the transporting of stolen money in interstate commerce. He arrived in California and it was finished and the fact that he used the money thereafter is not an element of that particular offense. It may be some other offense, but not the offense charged. He is not charged with criminally using stolen funds, or something like that." (Tr. 226-27). Though counsel now cleverly attempts to argue that this objection was directed to the conspiracy and embezzlement crimes, it is clear that he is mistaken.

Powe now objects to what he claims was the District Court's failure to delineate the time limit of the conspiracy, a reading of the entire charge shows that Judge Wyatt carefully and clearly defined a conspiracy, explained what evidence was required to establish the existence of the conspiracy, explained the basis on which the defendant could be found to be a member of the conspiracy, and explained that each offense was a separate offense. (Tr. 204-05, 210-14). The District Court's instruction on duration of the conspiracy was clear and accurate:

> "It is not required that the government prove that the conspiracy started or ended on the dates alleged in the indictment. It is sufficient that you find that a conspiracy was formed and existed for some time within that period." (Tr. 210-11).

Indeed, this charge uses the conventional form for duration of a conspiracy approved in this circuit. *E.g.*, *United States* v. *Ramirez*, 482 F.2d 807, 816-817 (2d Cir.), *cert. denied*, 414 U.S. 1070 (1973); *United States* v. *Postma*, 242 F.2d 488, 496-497 (2d Cir.), *cert. denied*, 354 U.S. 922 (1957).*

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* Powe's claim that the jury should have been explicitly instructed that they could not convict on the conspiracy and embezzlement counts merely on the evidence that he helped spend the money is ridiculous in view of Patricia Carter's explicit testimony that he helped plan the crime. In addition, the argument that the omission of such a charge was plain error is foreclosed by the recent decision of this Court in *United States* v. *MacDougal-Pena*, Dkt. No. 76-1320, slip op. 675 (2d Cir., December 1, 1976). In that decision this Court found not to be clear error the omission of the charge recommended in *United States* v. *Garguilo*, 310 F.2d 249, 254 (2d Cir. 1962), despite the fact that the case against one of the defendants rested *solely* on circumstantial evidence. Since the jury in this case must have believed the explicit testimony of Patricia Carter, they simply could not have been misled about the elements of the offense—which were, in any event, carefully explained to them.

Similarly incorrect is Powe's contention that the District Court had to charge the jury that the defendant's dominion and control over the embezzled funds in its interstate transportation was an element of the crime; and, that the fact that the defendant spent the money was insufficient to establish his guilt of the crimes charged.* It is clear, moreover, that when the charge is seen in its proper context, as it must, see *United States* v. *Santiago*, 528 F.2d 1130, (2d Cir. 1975), the Court properly charged the jury on the issue of the defendant's transportation of the stolen money from New York to Philadelphia and to Oakland and on the issue that the defendant knew that the money was stolen when it was transported.**

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* It should be pointed out that the cases cited by the defendant are completely inapplicable to the facts here. Those cases cited by defendant deal with a defendant who merely provided assistance to the perpetrator of the actual crime *after its completion*—and nothing more. Additionally, the case of *United States* v. *Infante*, 474 F.2d 522 (2d Cir. 1973), is similarly inapplicable to the facts here since in this case there is ample proof of defendant's possession, control and utilization of the stolen money from New York to and, including, in Oakland.

** Judge Wyatt stated:

"Now, members of the jury, we turn to the third and last count. The third count charges a violation by the defendant of a federal law which in relevant part provides:

"Whoever transports in interstate commerce any money of the value of $5,000 or more knowing the same to have been stolen, converted or taken by fraud is guilty of an offense."

The third count also involves a second law which is part of the aiding and abetting statute and which reads in relevant part as follows:

"Whoever wilfully causes an act to be done which if directly performed by him would be an offense against the United States is punishable as a principal.

Now, the third count, which I won't read word for word in substance charges that on or about August 7, 1973 the

[Footnote continued on following page]

defendant transported and caused to be transported in interstate commerce from New York to Philadelphia and elsewhere money in the amount of some $31,000 knowing the same to have been stolen, converted and taken by fraud.

Now that is the third count, to which the defendant pleaded not guilty, which raises the fact issue to be tried.

There are four essential elements of the offense charged in this third count, and they are as follows:

First, that the defendant transported money in interstate commerce or wilfully caused money to be transported in interstate commerce.

Second, that at the time of the transportation the money had been stolen, converted or taken by fraud.

Third, that the money had a value of $5,000 or more;

And, fourth, that at the time of the transportation the defendant knew that the money had been stolen, converted or taken by fraud.

Now, members of the jury, I have been using a certain number of legal terms and I will define some of those terms. Stolen, converted or taken by fraud means any taking by which a person dishonestly obtains money which belongs to another with the intent to leprive the rightful owner of such money. Money means legal tender of the United States. Value means the face value of the money. Interstate commerce refers to commerce between one state or the District of Columbia and another state or the District of Columbia.

Evidence was admitted which, if believed, would indicate that the defendant Powe was, shortly after money had been stolen from the Chemical Bank, in possession of that money.

If you find that the defendant Powe was thus in possession of the money, this would justify but would not compel an inference that he knew that the money was stolen unless on all the evidence from whatever source his possession is accounted for in some way consistent with innocence.

If you find that the defendant Powe was in possession in Pennsylvania, California or elsewhere of money recently stolen in New York, this would justify but would not compel an inference that the defendant Powe was a party to the transportation in interstate commerce of the money either as a principal or as an aider and abetter [sic]." (Tr. 214-217).

The District Court correctly instructed the jury on the law concerning the permissible inferences they could make: that defendant's possession of the money after it was stolen justified the inference that the possession is guilty possession unless explained by the circumstances or accounted for in some way consistent with innocence, and that he was a party to the interstate transportation of the stolen money either as a principal or as an aider and abettor. *United States* v. *Barnes*, 412 U.S. 837 (1973); See also, *United States* v. *Brawer*, 482 F.2d 117, 125 (2d Cir. 1973); *United States* v. *Jacobs*, 475 F.2d 270, 280 (2d Cir. 1973); *United States* v. *Izzi*, 427 F.2d 293, 297 (2d Cir.), *cert. denied*, 399 U.S. 982 (1970); *United States* v. *Coppola*, 424 F.2d 991, 993 (2d Cir.), *cert. denied*, 399 U.S. 928 (1970) (a gap of *five* months between theft and defendant's possession of bonds permitted inference that defendant transported bonds from New York to Connecticut and that he participated in its transportation as a principal or abettor); *United States* v. *De Sisto*, 329 F.2d 929, 935 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964). Accordingly, the District Court's charge can hardly amount to error, and surely not the plain error, F.R. Crim. P. 52(b), that the defendant now claims.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1976—714—017—ASNY—511

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State of New York)
County of New York)

Frederick T. Davis being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20 day of December 1976 he served ~~a copy~~ two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Henry J. Bottel
233 Broadway
New York N.Y. 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Frederick T. Davis

Sworn to before me this

20 day of December 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0935510
Qualified in Kings County
Commission Expires March 30, 1977